Lo Khi On (t/a Fuji Hairdressing Saloon) v Tanjong Aru Hotel Sdn Bhd

HIGH COURT (KOTA KINABALU) — SUIT NO K663 OF 1985
IAN CHIN J
2 SEPTEMBER 1994

Civil Procedure *— Trial — Submission of no case to answer — Claim for breach of contract — Admission of breach by defendant contained in defence — Whether sufficient to prove plaintiff's case — Whether submission of no case could be sustained*

Evidence *— Standard of proof — Breach of tenancy agreement — Alleged illegal activities on premises — Whether proof of illegal activities on balance of probabilities or higher degree*

Contract *— Damages — Nominal damages — Breach of tenancy agreement — No proof of actual damage — Damages can be inferred from disruption to business*

Civil Procedure *— Trial — Right to begin — When defendants should begin — Rules of the High Court 1980 O 35 r 4(1), (2)*

The plaintiff, the sole proprietor of the a hairdressing saloon, entered into an agreement ('the agreement') with the defendants, the owner of Tanjong Aru Beach Hotel ('the hotel'), whereby the defendant let to the plaintiff certain premises in the hotel for a term of three years. After several months, the defendants entered the premises and evicted the plaintiff. The plaintiff claimed damages for breach of the agreement. The defendants did not deny the re-entry of the premises but maintained that the plaintiff, in breach of the agreement, had caused illegal massage activities to be carried out in the premises, which entitled them to terminate the agreement and counterclaimed for damages. The defendants relied on a letter from the municipal council ('the letter') requesting them to stop the hairdressing saloon from operating within the hotel premises as it had been carrying on illegal massage activities. At the close of the plaintiff's case, the defendants elected not to call evidence and submitted that there was no case to answer.

Held, awarding damages of RM1 and costs to the plaintiff:

(1) The defendants' admission in their defence that they had re-entered the premises before the expiry of the agreement was sufficient prima facie evidence to establish the plaintiff's case. Therefore, since no evidence was adduced by the defendants, on account of the election, and since there was no evidence of the illegal massage activities, the submission of no case to answer could not be sustained.

(2) The defendants had to prove the truth of the statement in the letter that illegal massage activities were carried on in the premises

but there was no proof of that on the balance of probabilities. In any event, the court was of the opinion that though the ordinary standard of proof on a balance of probabilities applied, the degree of probability must be higher if the allegation was serious, as in this case, than, for example, that of negligence.

(3) There was no evidence as to the damages suffered by the plaintiff. The fact that he had suffered loss could be inferred by the disruption to his business due to the defendants' unlawful re-entry to the premises. Therefore, nominal damages of RM1 and costs were awarded to the plaintiff and the defendants' counterclaim was dismissed, also with costs to the plaintiff.

Obiter:

Ordinarily, it is the plaintiff who should begin his case under O 35 r 4(2) of the Rules of the High Court 1980. However, this would have been a suitable case for the defendants to begin first, if counsel had so requested under O 35 r 4(1), as the defendants were the ones making the positive assertions, in respect of which they bore the burden of proof. On the part of the plaintiff, he had only to prove damages.

[Bahasa Malaysia summary

Plaintif, seorang tuan punya tunggal sebuah kedai mendandan rambut, telah mengikat suatu perjanjian ('pejanjian itu') dengan defendan, pemunya Tanjong Aru Beach Hotel ('hotel itu'), di bawah mana defendan telah menyewa kepada plaintif premis tertentu di dalam hotel itu bagi tempoh tiga tahun. Beberapa bulan selepas itu, defendan telah memasuki premis tersebut dan mengusir plaintif. Plaintif telah menuntut ganti rugi untuk kemungkiran perjanjian itu. Defendan tidak menafikan bahawa mereka telah memasuki semula premis itu tetapi menegaskan bahawa plaintif telah memungkiri perjanjian itu dengan menjalankan kegiatan haram di atas premis itu, yang memberikan hak kepada mereka untuk menamatkan perjanjian itu dan telah menuntut balas untuk ganti rugi. Defendan bergantung pada sepucuk surat daripada majlis perbandaran ('surat itu') yang memohon mereka supaya memberhentikan kedai mendandan rambut itu daripada menjalankan operasinya di dalam premis hotel kerana ia telah menjalankan kegiatan mengurut secara haram. Pada penutup kes plaintif, defendan telah memilih supaya tidak mengemukakan keterangan dan berhujah bahawa tidak ada kes untuk dijawab.

Diputuskan, mengaward ganti rugi sebanyak RM1 dan kos kepada plaintif:

(1) Pengakuan defendan di dalam pembelaan mereka bahawa mereka telah memasuki semula premis itu sebelum penamatan perjanjian itu merupakan keterangan prima facie yang mencukupi untuk

membuktikan kes plaintif. Dengan demikian, oleh kerana keterangan tidak dikemukakan oleh defendan, akibat pemilihan mereka itu, dan oleh kerana tidak ada bukti tentang kegiatan mengurut yang haram, penghujahan bahawa tidak ada kes untuk dijawab tidak boleh dibenarkan.

(2) Defendan mesti membuktikan kebenaran penyataan di dalam surat itu bahawa kegiatan mengurut dijalankan secara haram di dalam premis itu tetapi tidak ada bukti mengenainya atas imbangan kebarangkalian. Bagaimanapun, mahkamah berpendapat bahawa walaupun standard bukti yang biasa atas imbangan kebarangkalian terpakai, darjah kebarangkaliannya mestilah lebih tinggi jika pengataan itu adalah serius, seperti di dalam kes ini, daripada, misalnya, pengataan kecuaian.

(3) Tidak ada bukti tentang ganti rugi yang dialami oleh plaintif. Hakikat bahawa beliau telah mengalami kerugian boleh diinfer daripada gangguan kepada perniagaannya akibat daripada pemasukan defendan ke dalam premis itu secara menyalahi undang-undang. Oleh itu, ganti rugi nominal sebanyak RM1 dan kos diaward kepada plaintif dan tuntutan balas defendan ditolak, juga dengan kos kepada plaintif.

Obiter:

Biasanya, plaintif yang seharusnya memulakan kesnya di bawah A 35 k 4(2) Kaedah-Kaedah Mahkamah Tinggi 1980. Bagaimanapun, kes ini merupakan suatu kes yang sesuai untuk defendan bermula dahulu, jika peguambela telah memohon sedemikian di bawah A 35 k 4(1), kerana defendanlah yang membuat penegasan positif, untuk mana mereka memikul beban pembuktian. Pada pihak plaintif, beliau hanya perlu membuktikan ganti rugi.]

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal No Q–08–87–94.]

Notes

For cases on nominal damages, see 3 *Mallal's Digest* (4th Ed) paras 1044, 1046; [1993] Mallal's Digest 468.

For cases on submission of no case to answer, see 2 *Mallal's Digest* (4th Ed) paras 2365–2372; [1989] Mallal's Digest 451; [1993] Mallal's Digest 813.

For a case on the right to begin, see 2 *Mallal's Digest* (4th Ed) para 2362.

Cases referred to

Beaumont v Greathead (1846) 2 CB 494 (refd)

Eastern Enterprises Ltd v Ong Choo Kim [1969] 1 MLJ 236 (refd)

Hornal v Neuberger Products Ltd [1977] 1 QB 247; [1956] 3 All ER 970; [1956] 3 WLR 1034 (refd)

A *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627 (folld)
Re Parry (decd); Parry v Fraser (Note) [1977] 1 All ER 309; [1977] 1 WLR 93 (refd)

Legislation referred to

B Rules of the High Court 1980 O 35 r 4(1), (2), (6)
Kota Kinabalu Municipal Council (Hairdressers) By-laws 1966, by-law 6
Kota Kinabalu Municipal Council (Massage Establishments) By-laws 1979, by-law 3

C *Norbert Chin* (*Dr Yee Tan & Norbert Chin*) for the plaintiff.
Peggy Liow (*Jayasuriya Kah & Co*) for the defendants.

Cur Adv Vult

D **Ian Chin J**: This action was taken out on 12 July 1985 by the plaintiff, Lo Khi On, the sole proprietor of the firm Fuji Hairdressing Saloon ('the plaintiff') against Tanjong Aru Hotel Sdn Bhd ('the defendants') for repossession of an area measuring 453sq ft known as Lot No 2 ('the premises'), situated on the ground floor of Tanjong Aru Beach Hotel, and damages for breach of an agreement. The trial commenced on 29 August E 1994 and it ended by the afternoon of the same day. The undisputed facts and the allegations of the case are as follows:

Facts and allegations

F On 20 February 1984, the plaintiff entered into an agreement ('the agreement') with the defendants, the owner of the property known as Tanjong Aru Beach Hotel in Tanjong Aru, Kota Kinabalu, whereby the defendant let to the plaintiff the premises for a term of three years. Possession of the premises was thereafter given to the plaintiff. On 12 November 1984, the defendants entered the premises and evicted the G plaintiff. The plaintiff claims that this action of the defendants is in breach of the agreement. The defendants do not deny the re-entry of the premises but the defendants maintain that the plaintiff, in breach of the agreement, had caused illegal massage activities to be carried out in the premises which entitled them to terminate the agreement which they did by a letter H dated 12 November 1984. The defendants counterclaimed for damages alleging that it was the plaintiff who was in breach of the agreement. From the pleadings delivered, I am of the opinion that the issues are clearly defined, viz:

(1) Did the plaintiff, in breach of cl 3 of the agreement, cause to be I carried out in the premises illegal massage activities;

(2) Did the illegal massage activities, if proven to have taken place and to have been caused by the plaintiffs, prejudice any licence held by the defendants in connection with the defendants' business; and

(3) Did the plaintiff suffer any damages as a result of his eviction from the premises. A

The plaintiff's claim for repossession of the premises was not pursued since Mr Norbert Chin, counsel for the plaintiff, did not address the court on the issue and he only confined himself to the question of damages. Having defined the issues, my next task then was to decide who should begin the case. B

Who should begin

What is also clear from the pleadings, which I will advert in more detail at a later stage, is that the defendants are making all the positive assertions engendered in the said issues and which they will have to prove. On the part of the plaintiff, he need only prove damages. Who then should begin the case in such a situation? Ordinarily, it is the plaintiff who should begin his case (see O 35 r 4(2) of the Rules of the High Court 1980). There are exceptions, one of which is O 35 r 4(6) which says: C D

> Where the burden of proof of all the issues in the action lies on the defendant or, where there are two or more defendants, and they appear separately or are separately represented, on one of the defendants, the defendant or that defendant, as the case may be, shall be entitled to begin, and in that case paragraphs (2), (3) and (4) shall have effect in relation to, and as between him and the plaintiff as if for references to the plaintiff and the defendant there were substituted references to the defendant and the plaintiff respectively. E

The other exception is in the discretion granted to the court under O 35 r 4(1) to direct who should begin but any defendant seeking to begin where the case is not one within O 35 r 4(6) must satisfy the court that there is a good reason for doing so (*Re Parry (decd); Parry v Fraser (Note)* [1977] 1 All ER 309; [1977] 1 WLR 93). There is no denying that damages, which the plaintiff has to prove, is an issue in our case and thus, the defendants do not carry the burden of proof of all the issues, thereby rendering O 35 r 4(6) inapplicable. But the practical difficulty that entails with the plaintiff beginning his case instead of the defendants, began to emerge when the witnesses for the plaintiff gave evidence and were cross-examined by Ms Peggy Liow, counsel for the defendants. The evidence of illegal massage activities, the particulars of which are not specified in the defence (but then again the pleading was not attacked by way of request for further and better particulars), would have to be elicited first before the plaintiff can rebut the evidence. It was at this stage of the proceedings that I prompted Ms Peggy Liow to put the allegations of illegal massage activities to the witnesses of the plaintiff which was not done when the first witness of the plaintiff gave evidence and I wonder whether it would have been done to the other witnesses had it not been for my prompting. I would have exercised my discretion under O 35 r 4(1), if counsel had pressed for it, to allow the defendants to commence its case as I think this is a suitable case for the defendants to do so for the reason that the plaintiff F G H I

had nothing to prove except for damages which, for the reason I shall state later when I consider the question of damages, in any event can be inferred without any evidence of damage. If the defendants were to adduce evidence of the illegal massage activities at the defence stage, it would most probably involve the plaintiff having to either recall his witnesses or call additional witnesses to adduce rebuttal evidence resulting in a prolonged and more expensive trial which otherwise would be avoided if the defendants were to begin its case. As the events turn out, it does not matter because the defendants elected not to adduce evidence at the close of the case for the plaintiff. I will now turn to the evidence adduced in this case.

Evidence

The plaintiff called three witnesses, all former employees of the plaintiff and, as expected, they gave evidence that no limb massages took place in the saloon. The bulk of the cross-examinations were directed at the transparency or otherwise of the activities that were carried on in various sections of the saloon. I will digress here to advert to the relevant subsidiary legislation which were cited by both parties and upon which the defendants rely for their defence and which explain the questions put to the witnesses. The first is the Kota Kinabalu Municipal Council (Hairdressers) By-laws 1966 which governs the trade of hairdressing and provides for the payment of licence fees. One of the fees payable under by-law 6 is worded as follows:

	Per month per seat ($)
(a) Hairdressing with limb massage ...	90

The other by-law referred to is the Kota Kinabalu Municipal Council (Massage Establishments) By-laws 1979 but only by-law 3 is of relevance and it says:

> (1) Subject to paragraph (2) no person shall operate a massage establishment without a licence in that behalf issued by the Council under these By-laws.
>
> (2) A hairdresser's premises shall not be required to be licensed under this by-law notwithstanding that facial or scalp massage or manicure treatment to customers is administered in the said premises, so long as the massage or manicure treatment aforesaid is administered in full view of other customers.

The evidence, which I now return to, was mostly elicited by cross-examination. The evidence reveals there were cubicles in the premises where the customers were being serviced. Questions were directed at establishing whether one customer of the saloon can see another, to which the witnesses testified in the affirmative. Apart from that, no evidence was led to establish the special damages claimed nor was evidence led to show that the plaintiff had suffered loss and damage. The plaintiff closed its case, not unexpectedly, because the plaintiff does not carry the burden of proof of the assertions save for damages, upon the very little evidence I had

just referred to. I then turned to Ms Peggy Liow to ask her election and she initially indicated that she will call evidence but she changed her mind after the lunch break and elected to submit that the plaintiff had failed to make out a case. This came as a result, I am inclined to believe, of my remark that the plaintiff had not proved damages. Ms Peggy Liow, I am of the view, had wisely chosen this course because it was obvious from the way questions were put to the plaintiff's witnesses that the defendants would not be able to establish that illegal massage activities had been carried out in the premises. This has resulted in a tremendous saving of costs which otherwise would have been incurred if the witnesses were called. As for the submissions in the speeches of both learned counsel, I will deal with them as I set out my reasons for the decisions I am going to make.

Submission of no case and conclusions

Ms Peggy Liow argued that the plaintiff must prove that the re-entry of the premises by the defendant was unlawful and this, according to Ms Peggy Liow, the plaintiff had failed to do. With all due respect to her, she failed to appreciate the issues which the pleadings had defined and as to whom rests the burden of proving the assertions. I have at the outset already set out the issues which arose as a result of the pleadings. I will first turn to the statement of claim, the relevant paragraphs of which are these:

> (3) By an agreement in writing made on 20 February 1984 between the defendant of the one part and the plaintiff of the other part, the defendant let to the plaintiff the premises known as Lot No 2, comprising 453sq ft on the ground floor of Tanjong Aru Beach Hotel and situate at Tanjong Aru, Kota Kinabalu, Sabah for a term of three (3) years from 15 January 1984 at a rent of RM3,000 per month. The plaintiff will refer to the said agreement at the trial for the full terms and effects thereof.
>
> (4) The said tenancy contained a covenant by the defendant that the plaintiff shall peaceably and quietly hold the said premises during the said term without any interruption by the defendant or any persons lawfully claiming under or in trust for it.
>
> (5) The defendant in breach of the said agreement on 12 November 1984 wrongfully entered the said premises and evicted the plaintiff and his servants, and further locked up the said premises thereby depriving the plaintiff of the use of the said premises.
>
> (6) By reason of the foregoing the defendant is in breach of the covenant for quiet enjoyment referred to in paragraph 4 hereof and further is in breach of the said agreement and as a result the plaintiff has suffered loss and damage.

It is clear from the just quoted paragraphs of the statement of claim that the plaintiff alleges that he had entered into the agreement with the defendants for three years and that before the expiry of the three years the defendant had, in breach of the agreement, re-entered the premises on 12 November 1984, and wrongfully terminated the agreement. When the

defence was delivered, apart from admitting the agreement and the tenancy for three years, the defence went on to state as follows:

> (3) It was a material term of the agreement that the plaintiff shall not, inter alia, permit or suffer any part of the said premises to be used for any illegal purposes or permit to be done anything to prejudice any licence held by the defendants in connection with the defendants' business.
>
> (4) In breach of the term mentioned in para 3 above, the plaintiff has caused illegal massage activities to be carried out in the said premises.
>
> (5) By a letter dated 12 November 1984, the defendants informed the plaintiff about the illegal massage activities being carried out in the said premises and gave notice for the determination of the agreement which they are lawfully entitled to do under the agreement.
>
> (6) By reason of the above, the defendants deny that they are in breach of the agreement or that they have wrongfully re-entered the said premises.

The defence, from the paragraphs just quoted, had further admitted re-entry of the premises on 12 November 1984 before the expiry of the agreement. The defendants, as can be gathered from the said paragraphs of the defence, are asserting that they have a right to do so because the plaintiff had carried out illegal massage activities which prejudice the business licence of the defendants and thus entitled them to terminate the agreement. Clearly, the defendants have to prove they were entitled to terminate the agreement and it is not for the plaintiff to prove that the defendants had not lawfully re-entered the premises. It is admitted that the termination of the agreement was before the expiry date; that, in my view, is sufficient prima facie evidence to establish the plaintiff's case and no evidence need be adduced to prove the re-entry of the premises and the termination of the agreement by the defendants. The onus is on the defendants to prove their said assertions, failing which they would fail in their defence save as regards damages. Since no evidence was adduced by the defendants, on account of the election, and since there was no evidence that illegal massage activities had been carried out, the submission of no case cannot be sustained. Ms Peggy Liow had also submitted that the illegal massage activities were proven by the statements contained in the letter (exh P6) which has been admitted as evidence. The terms of this letter are as follows:

> Majlis Perbandaran Kota Kinabalu
> Etc ...
>
> 26 October 1984
>
> The General Manager
> Tanjong Aru Beach Hotel
> Kota Kinabalu.
>
> Attention: Encik W Kollman
>
> Tuan
>
> Illegal massage activities — Fuji Hairdressing Saloon

Your attention is drawn to the illegal activities carried out by Fuji Hairdressing Saloon within your hotel premises. Such activities are in contravention of the provisions of the Kota Kinabalu Municipal Council (Massage Establishments) By-laws 1979. The Council has also issued a notice to the operator of the saloon for carrying out renovation works to the approved plan. Enclosed is a photostat copy of the notice for your reference. Our inspection (Kollman/Leong) on 25 October 1984 at 2.30pm confirms what has been said earlier of the illegal massage activities.

2 In order to uphold the good image of your hotel and Sabah in general you are hereby given notice to stop the hairdressing saloon from operating within your hotel premises forthwith.

Yang benar
—Sgd—
bp Setiausaha Perbandaran
Majlis Perbandaran Kota Kinabalu

Ms Peggy Liow argued that this letter establishes the illegal massage activities of the plaintiff which justified the termination of the agreement. Assuming for the moment that the illegal massage activities had been established, it must not be forgotten that it is a term of the agreement, and thus is asserted by the defendants in their defence, that the activity must also be, to quote the words of the pleading of the defendants, 'to prejudice any licence held by the defendants in connection with the defendants' business'. Ms Peggy Liow did not address the court on this point and there is no evidence that any of the defendants' licences had been prejudiced. Turning again to the letter, one has to ask whether this letter can be regarded as proof of the alleged illegal massage activities (which the plaintiff had denied in his reply and in the numerous letters produced in court). I do not think so and support for my view can be found in the following passage in the recent Supreme Court case of *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627 at pp 631–632, viz:

> On the question of a balance sheet, the Indian Supreme Court, in *Petlad Turkey Red Dye Works Ltd v Dyes & Chemical Workers' Union, Petlad & Anor* [1960] 2 SCR 906, has held that a balance sheet does not by itself prove the facts stated therein. It has to be proved like any other fact by affidavit or otherwise. Das Gupta J, delivering the judgment of the court, stated (at p 909):
>
> > 'All that the balance sheet, as submitted, shows is that certain statements were made. The mere fact that the statements were made can never be taken as proving that the statements were correct.
> >
> > That is a distinction which the courts of law have always been careful to make. Thus, if a person is to prove that he was ill on a particular date, the mere filing of a certificate of a medical man that he was ill on that date is not accepted as evidence to show that he was ill. The correctness of the statement made in the certificate has to be proved by an affidavit or oral testimony in court by the doctor concerned or by some other evidence. There is no reason why an exception should be made in the case of balance sheets prepared by companies for themselves. It has to be borne in mind that in many cases the directors

A of the companies may feel inclined to make incorrect statements in these balance sheets for ulterior purposes. While that is no reason to suspect every statement made in these balance sheets, the position is clear that we cannot presume the statements made therein to be always correct. The burden is on the party who asserts a statement to be correct to prove the same by relevant and acceptable evidence.'

B Likewise, in the instant case, the summary of accounts does not prove the facts and particulars stated therein. The mere fact that the summary of the particulars were made could never be taken as proving that the contents were correct. It has to be proved by calling the maker to explain the facts and the basis of the calculation of the amount claimed.

C Clearly from the passage just quoted, the defendants have to prove the truth of the statement (in the letter) that illegal massage activities were carried on in the premises and this has not been done. In any event the letter is far from clear as to the place, whether it was in the rooms of the hotel or in the premises, where the illegal massage activities were alleged to have been carried out. Therefore, even assuming what the letter says is the truth and D even assuming, as Ms Peggy Liow argued and with which I disagreed, that the burden of proving that the plaintiff had committed a statutory offence (that of carrying out illegal massage activities) is simply on a balance of probabilities, the just referred to evidence fell woefully short of that standard; even more so when there is evidence to say that room service massage was E carried out and the letter may be construed as being directed at the room service massage which activity is not relied on by the defendants for eviction of the plaintiff. The plaintiff had established his case on a balance of probabilities because the facts and circumstances of this case justify the inference that the plaintiff had suffered loss. As regards the standard of proof, I am of the view that though the ordinary standard of proof on a F balance of probabilities applies the degree of probability must be higher if the allegation is serious (see *Hornal v Neuberger Products Ltd* [1977] 1 QB 247; [1956] 3 All ER 970; [1956] 3 WLR 1034; *Eastern Enterprises Ltd v Ong Choo Kim* [1969] 1 MLJ 236). The allegation that an offence under the Kota Kinabalu Municipal Council (Massage Establishments) By-laws 1979 G had been committed requires proof of a much higher degree of probability than, say, that of negligence. I will turn now to the question of how much damages should the plaintiff be awarded.

There is no evidence, as was said earlier, as to the damages suffered. Mr Norbert Chin made a vain attempt to ask the court to take note that a H barber chair costs RM12,000 a piece, to which I would say it is not a notorious fact which the court can take judicial notice of. Outside of the hairdressing trade, no one knows the price of a barber chair and it cannot therefore be said that it is a well-known fact that a barber chair costs RM12,000. Then again, there was no evidence that any barber chair was lost as a result of the breach of the agreement. That the plaintiff had I suffered loss could, as said earlier, justifiably be inferred by the sudden disruption to his business resulting from the unlawful re-entry by the defendants to the premises. Nominal damages may be awarded where the

fact of a loss is shown but the necessary evidence as to its amount is not given which is the case here (see *McGregor on Damages* (15th Ed) at para 399). I, therefore, award the plaintiff damages of RM1. But the RM1, apart from vindicating the plaintiff's right, is also of sufficient strength to serve, to borrow the words of Maule J in *Beaumont v Greathead* (1846) 2 CB 494, as a mere peg on which to hang costs, which I award to the plaintiff. The defendants' counterclaim is dismissed also with costs to the plaintiff.

Order accordingly.

Reported by Anne Khoo